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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977

NO. 77-1163
E. RICHARD FRIEDMAN, O.D., et al
Appellants

V.

N. J. ROGERS, O.D., et al
Appellees

NO. 77-1164
N. J. ROGERS, O.D., et al
Appellants

V.

E. RICHARD FRIEDMAN, O.D., et al
Appellees

NO. 77-1186
TEXAS OPTOMETRIC ASSOCIATION,
INC., et al
Appellants

V.

N. J. ROGERS, O.D., et al
Appellees

Consolidated Appeals From
The United States District Court
For the Eastern District of Texas
Beaumont Division

BRIEF OF APPELLEE, TEXAS OPTOMETRIC ASSOCIATION, INC., IN SUPPORT OF THE CONSTITUTIONALITY OF SECTION 2.02 OF THE TEXAS OPTOMETRY ACT

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BRIEF OF APPELLEE, TEXAS OPTOMETRIC ASSOCIATION, INC., IN SUPPORT OF THE CONSTITUTIONALITY OF SECTION 2.02 OF THE TEXAS OPTOMETRY ACT

Opinion Below

The opinion of the District Court for the Eastern District of Texas, Beaumont Division, entered on September 12, 1977, is reported at 438 F. Supp. 428. A copy of that opinion may be found in the Jurisdictional Statement filed by Appellants.

Jurisdiction

This suit was brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331, 1343, 2201, 2281, and 2284 in the United States District Court for the Eastern Division of Texas, to enjoin as unconstitutional the enforcement of Sections 2.02, 5.09(a), 5.13(d) and 5.15(e) of the Texas Optometry Act. A three-judge district court was convened to hear this cause as was then required by 28 U.S.C. §2281 and 2284. The final judgment of the court was entered on October 27, 1977, declaring a portion of §5.09(a) and §5.13(d) unconstitutional, and declaring §2.02 and 5.15(e) constitutional. Notice of appeal was filed in the court below by the Texas Optometric Association, Inc. on December 22, 1977, by the State of Texas on December 20, 1977, and by Dr. Rogers, et al, on December 21, 1977. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253 and §2101(b). This Court noted probable jurisdiction in this case and consolidated the three separate appeals on April 17, 1978.

Questions Presented

I. Whether the Three-Judge Federal Court erred in determining that §2.02 of the Texas Optometry Act has a rational basis and does not deprive Appellant Rogers of equal protection of the laws.

II. Whether the Three-Judge Federal Court erred in determining that §2.02 does not deprive Appellant Rogers of due process of law.

III. Whether the Three-Judge Federal Court erred in determining that §2.02 does not infringe upon Appellant

Texas Senior Citizen Association's First Amendment rights to receive commercial information.

IV. Whether this Court should consider an issue which was not pleaded, briefed, argued or ruled upon in the court below; and if so, whether §2.02 infringes upon Appellant Dr. Rogers' First Amendment rights of free speech and association.

V. Whether this Court should consider an issue which was not pleaded, briefed, argued, or ruled upon in the court below and which was not raised in Appellant's Jurisdictional Statement; and if so, whether §2.02 conflicts with §1 of the Sherman Anti-trust Act such as to be invalid under the Supremacy Clause.

Statute Involved

The court below declared that §2.02 of the Texas Optometry Act, Article 4552 of the Revised Civil Statutes of Texas, was constitutional. The statute reads as follows:

> Article 4552, §2.02. To be qualified for appointment as a member of the [Texas Optometry] board, a person must be a licensed optometrist who has been a resident of this state actually engaged in the practice of optometry in this state for the period of five years immediately preceding his appointment. A person is disqualified from appointment to the board if he is a member of the faculty of any college of optometry, if he is an agent of any wholesale optical company, or if he has a financial interest in any such college or company. *At all times there shall be a minimum of two-thirds of the board who are members of a state optometric assocation which is recognized by and affiliated with the American Optometric Association.*

Statement of the Case

On August 25, 1975, Appellant, Dr. Rogers, who is a member of the Texas Optometry Board, brought this case against the remaining five members of the Texas Optometry Board. In his suit, Dr. Rogers challenged §2.02 and various other sections of the Texas Optometry Act as being unconstitutional and sought to enjoin their enforcement. Section 2.02, which is the statute at issue in this appeal, was challenged as being an arbitrary classification in violation of Dr. Rogers' Fourteenth Amendment rights to equal protection and due process. A three-judge court was convened to consider this case.

On June 11, 1976, W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter intervened and asserted that §2.02 violated Senior Citizens' First Amendment rights. Mr. Dickinson and his association will hereinafter be referred to as "Senior Citizens".

On September 13, 1976, the Texas Optometric Association, Inc., intervened in support of the Texas Optometry Board members and in support of the constitutionality of §2.02.

On October 27, 1977, the three-judge court entered its final judgment holding that §2.02 does not violate the First or the Fourteenth Amendments of the United States Constitution and denied injunctive relief. From this holding Dr. Rogers and Senior Citizens have appealed.

Summary of Argument

I. *Equal Protection.* The three-judge court below was correct in holding that §2.02, the provision of the Texas Optometry Act which requires that four of the six members of the Texas Optometry Board belong to the Texas Optometric Association (TOA), does not violate Dr. Rogers' constitutional right to equal protection. The Court properly applied the rational basis test which dictates that where the Legislature could have had a rational basis for creating a classification in matters of economic regulation, the courts will defer to the legislative determination and allow the statute to stand. The lower court concluded that there were several rational reasons for §2.02. These rational reasons were as follows:

1. That TOA members are more likely than non-TOA members to be economically independent and therefore less likely to be subject to economic pressures in decision making;

2. That TOA members are more likely than non-TOA members to emphasize and encourage the highest quality of eye care within the optometric profession; and

3. That the history of optometry in Texas indicates that TOA members are more likely than non-TOA members to enforce the Texas Optometry law.

While it is only necessary to show that the Legislature might have had these rational reasons for enacting §2.02, there is strong evidence that the Legislature was *actually aware* of these rational bases for §2.02.

Having determined that §2.02 did have a rational basis, the lower court correctly determined that §2.02 was not unconstitutional on equal protection grounds.

II. *Due Process*

A. *Substantive due process.* The court below correctly determined that §2.02 does not violate Dr. Rogers' right to substantive due process. The court properly determined that a rational basis analysis rather than an irrebutable presumption analysis would govern the constitutionality of §2.02. Furthermore, the court determined that even if an irrebutable presumption analysis were applied, §2.02 does not conclusively and irrebutably deny a board seat to non-TOA members. This is graphically demonstrated by the fact that the appellant Dr. Rogers, not a TOA member, is currently on the Texas Optometry Board and has been on the board for more than 20 years. Furthermore, the fact that Dr. Rogers is on the board indicates that he has suffered no harm from such alleged irrebutable presumption, and therefore lacks standing to assert that objection.

B. *Procedural due process.* The court below correctly overruled Dr. Rogers' procedural due process contention that TOA members are inherently biased and that §2.02 is therefore unconstitutional on procedural due process grounds. Dr. Rogers is incorrect in asserting that every optometrist who belongs to TOA must be presumed biased and that §2.02 therefore creates an inherently biased board. Bias cannot be constructively presumed. Instead, it must be actually proven on a case-by-case basis. This lawsuit did not arise out of a specific

disciplinary proceeding where the actual parties are known and where the nature of the charges is known. Consequently, the elements necessary to determine actual bias are not present in this lawsuit. Dr. Rogers alleges that §2.02 is unconstitutional because there is the possibility of bias in some future case where the parties and charges are presently unknown. The three-judge court below correctly concluded that §2.02 should not be struck down merely because there *might* be bias in some future case. Section 2.02 does not violate Dr. Rogers' procedural due process rights.

III. *Free Speech and Association*

A. *Senior Citizens' rights to commercial free speech.* Appellant Senior Citizens asserts that §2.02 violates its First Amendment rights to receive price information through advertising in that §2.02 places four members on the Texas Optometry Board who belong to an association that historically supported the statutory ban on price advertising. In the court below, Senior Citizens argued that as a result of §2.02, the Optometry Board was more likely to enforce state laws banning price advertising and that therefore §2.02 itself impaired Senior Citizen's right to receive advertising information. The three-judge court properly concluded that this assertion was mooted when the statutory ban on price advertising was declared unconstitutional and when the board members were enjoined from enforcing that statute.

B. *Dr. Rogers' rights to free speech and association.* Dr. Rogers raises for the first time in his jurisdictional statement the assertion that *his* First Amendment rights

of speech and association are impaired by §2.02. Since this issue was not pleaded, briefed or argued in the court below, and since evidence was not taken regarding this issue, this Court should decline to consider this new issue.

However, even if this Court should decide to consider this issue, §2.02 does not unconstitutionally violate Dr. Rogers' rights to commercial free speech. Section 2.02 establishes the membership qualifications of the Texas Optometry Board. It does not prohibit advertising or in any other way limit commercial free speech. Dr. Rogers argues that his First Amendment rights of commercial free speech are violated because if he joins TOA, he will be forced to abdicate his right to advertise. This is incorrect. TOA does not limit advertising by its members. It is true that in pre-*Bates* days TOA did discourage advertising in much the same way that professional associations of lawyers, M.D.'s, and architects did. However, TOA no longer limits advertising by its members. Consequently, Dr. Rogers' assertion that he would be forced to abdicate his right to advertise if he joined TOA is incorrect.

Dr. Rogers further asserts that §2.02 deprives him of the opportunity to be a member of the "majority" of the board unless he joins TOA, and that therefore, §2.02 unconstitutionally infringes on his right of association. This, also, is incorrect. It is important to note that §2.02 does not in any way deprive Dr. Rogers of the right to serve on the Optometry Board. In fact, Dr. Rogers is on the board and has been for 20 years. Dr. Rogers only asserts that he is deprived of the right to be a member of

the theoretical "majority" of the board. This assertion is highly artificial. The Optometry Board is composed of six individuals, each obligated to vote their conscience with the best interest of the state in mind. As a result, the "majority" varies from vote to vote and issue to issue. Dr. Rogers has himself been a member of the majority of the board on many occasions. Dr. Rogers' assertion that §2.02 prevents him from being a member of a theoretical majority is therefore highly artificial. Dr. Rogers argues that §2.02 should be declared unconstitutional because in order to avoid this theoretical harm, he must allegedly sacrifice his right not to associate with TOA. Appellee urges that the harm alleged is intangible and highly theoretical and that any resulting infringement on Dr. Rogers' associational rights, is not substantial enough to constitutionally invalidate §2.02.

C. *Recent FTC Rules.* On May 24, 1978, the FTC promulgated rules which prohibit any person, including state officials, from limiting in any way the dissemination of information concerning optometric goods or services. The rules further prohibit any professional association from preventing its members from advertising. With the enactment of these regulations, any First Amendment commercial free speech objections raised by Dr. Rogers or Senior Citizens are mooted. Under the regulations, even if the Texas Optometry Board wished to restrict advertising, they would be unable to do so. Consequently, the composition of the board is absolutely irrelevant to whether or not commercial free speech is restricted.

IV. *Supremacy Clause/Sherman Anti-Trust argument.* In its brief on the merits, Senior Citizens raises an issue which was not raised in the court below or in Appellant's

jurisdictional statement to this Court. Appellant asserts that §2.02, which establishes qualifications for membership on the state Optometry Board, conflicts with §1 of the Sherman Anti-Trust Act which prohibits private restraints of trade. Senior Citizens argues that §2.02 is therefore invalid under the Supremacy Clause. In point of fact, there is no conflict between these statutes and there is no Supremacy Clause question raised. Since this issue has never before been raised in this lawsuit and since this new anti-trust issue bears little relationship to the constitutional question presently before this Court, this new issue would be most properly considered in a separate lawsuit. This Court should refuse to consider this new and unrelated argument.

Argument

I. THE THREE-JUDGE FEDERAL COURT CORRECTLY HELD THAT §2.02 OF THE TEXAS OPTOMETRY ACT HAS A RATIONAL BASIS AND THEREFORE DOES NOT DEPRIVE APPELLANT DR. ROGERS OF EQUAL PROTECTION OF THE LAWS.

A. *Findings in the Court Below.* In the court below, Dr. Rogers challenged the constitutionality of §2.02, alleging that it created an arbitrary classification of optometrists and thereby deprived him of equal protection under the laws as guaranteed by the 14th Amendment.

The three-judge court below correctly determined that the classification created by §2.02 was founded on a rational basis and therefore does not violate the equal protection clause. Citing *New Orleans v. Dukes,* 427 U.S. 297 (1976), the court noted that when local economic regulation is challenged as violating the equal protection clause, the court shall defer to legislative determination. The court correctly stated that a statutory determination will not be set aside if any state of facts might be conceived to justify it, *McGowan v. Maryland,* 366 U.S. 420 (1961), and that the burden is on the one attacking the statute to negative every conceivable basis which might support it. *Madden v. Kentucky,* 309 U.S. 83 (1940).

Applying these standards, the three-judge court determined that §2.02 was founded on a rational basis, specifically mentioning three rational reasons for the legislative requirement that the majority of the Optometry Board be composed of TOA members.

(1) TOA members are more likely to be economically independent than non-TOA members.

(2) TOA members have a greater likelihood of emphasizing the highest quality of eye care, as compared to non-TOA members; and

(3) TOA members are more prone to enforce the Texas Optometry Act than non-TOA members.

Having determined that the legislature might have had these rational reasons for enacting §2.02, the court properly deferred to the legislature and held §2.02 constitutional.[1] *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955).

B. *Analysis of the rational reasons for §2.02.*

1. *Professional vs. commercial optometry.* Preparatory to a discussion of the rationale for the statute, it would be helpful to briefly discuss the difference between "professional optometry" and "commercial optometry." Their general meaning is set forth in the deposition of Dr. James J. Riley, past president of TOA. (Appendix Vol. III, pp.187-199).

Generally, "professional" optometry includes those practitioners who are independent and whose historical emphasis has been high quality eye care. More specifically, "professional" optometry embodies a number of concepts which go beyond the minimum requirements of the

[1]Appellant Dr. Rogers has attempted to rebut these rational bases by arguing the credibility and weight of the evidence presented in the court below. Dr. Rogers fails to recognize that the weight of the evidence presented at trial is not the controlling issue in a rational basis analysis. The issue is whether or not there is *any set of facts* the legislature *might* have relied on in enacting the statute in question. *McGowan v. Maryland* 366 U.S. 420 (1961). The evidence presented in this case overwhelmingly establishes that the legislature not only might have had rational bases for enacting §2.02, but that the legislature was *actually aware* of the rational bases cited by the court.

law. These characteristics include: economic independence from outside control by opticians or department stores, a greater emphasis on continuing education, a greater emphasis on sufficient length of examination time, examination by appointment rather than a wait-in-line-method, gaining patients by professional reputation, and no direct or indirect tie-ins with opticians. (Dr. Riley, A-III, 187-193). *The membership of the Texas Optometric Association is comprised solely of professional optometrists.* (Dr. Riley, A-III, 203).

In contrast, "commercial" optometry includes the optometrists associated with the optical chains such as Texas State Optical (TSO) and Lee Optical. "Commercial" optometry is characterized by a particular mode of practice which emphasizes volume, speed and trade name practice. It is further characterized by: influence of the optometrist by outside interests; tie-ins with opticians; employment or partnership contracts that inhibit professional independence and professional judgment; high speed examinations; high volume of examinations; less emphasis on continuing education; and less emphasis on law enforcement of optometry statutes.[2] The Texas Association of Optometrists (TAO)[3] is comprised mostly

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[2]Another distinction which at one time existed but which is no longer a distinguishing factor centers around advertising. For years professional optometrists, like professional M.D.'s and attorneys, opposed the use of advertising by professionals. However, with this Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), professionals in optometry have changed with the times and no longer prohibit advertising. The TOA bylaws were recently amended to reflect this change. (See affidavit at page 57 of the Appendix to this brief.) Therefore, the advertising/non-advertising distinction no longer distinguishes professional optometrists from commercial optometrists.

[3]Not to be confused with T.O.A., Appellee herein.

of optometrists in commercial optometry, although a few professional optometrists are members of both TOA and TAO. (Dr. Riley, A-III, 193-199).

With this understanding of the difference between commercial and professional optometrists, and with the understanding that TOA is comprised solely of professional optometrists, it is appropriate to proceed with an analysis of the rational reasons for §2.02.

2. *The first rational basis is that TOA members are more likely than non-TOA members to be economically independent.* The first rational basis for §2.02 centers around economic independence. Obviously, there is a legitimate state interest in having Optometry Board members who are "their own boss" and who are not dominated or controlled by others. The danger of a lack of economic independence increases significantly when a board member has financial ties to opticians which may preclude his economic independence and which may interfere with his enforcement of the law as a board member.

One evil that the Legislature sought to avoid in §2.02 was domination of the board by owners of opticianries over optometrists who were employees of opticians or who were controlled by opticians through various financial ties. These types of control (and the dangers inherent in them) were in fact communicated to the members of the legislature in 1969 by TOA optometrists who were from the home districts of the legislators. (Dr. Riley, A-III, 237, 247-252).

The Legislature justifiably assumed that one who was employed and controlled by another would be reluctant

to "buck his boss" when it comes to enforcing the Optometry Act or voting a certain way as a member of the Optometry Board.

a. *The McGuire contract.* The lack of economic independence and the potential for domination of a Board member by opticians is exemplified by Dr. Rogers' contract for sale of a partnership interest in a TSO office to Dr. Richard P. McGuire (A-I, 71-98). The "partnership" provisions of the McGuire contract provide:

(1) The optometrist must devote full-time to the practice; must be present every working day of the year except two weeks' vacation; must be there during the two weeks' vacation if there are no substitute personnel available.

(2) The firm of Rogers Brothers must be retained, at a fee of 4% of net cash, for advice and supervisory services of accounting, advertising, programming, window display, etc.

(3) The optometrist must abide by Rogers Brothers rules, regulations, and policies for the management of the office, including policies concerning examination of patients, progress examinations, re-examinations, and all other policies regarding contact lenses, transfer patients, patients from other TSO offices. Such rules are determined solely by Rogers Brothers.

(4) All inventory and supplies must be purchased from Rogers Brothers, including all optical material of every nature such as frames, lenses, contact lenses, all prescrip-

tion work, opthalmic supplies, refracting equipment, and other optical supplies.

(5) All optical laboratory work must be done and purchased from Rogers Brothers laboratories.

(6) The optometrist must terminate the use of the TSO name if the partnership terminates for any reason.

(7) Rogers Brothers can terminate the contract upon misconduct or breach of contract by the optometrist. Misconduct is defined as including "consistent and willful refusal to follow management policies and procedures after receipt of written notice setting forth such deficiencies."

(8) The resident optometrist must covenant not to compete within three miles for a 10 year period in the event of the partnership being dissolved (for reasons other than sale).

These controls exist if the optometrist and Dr. Rogers are *partners.* However, even in the event Dr. Rogers sells the *entire* local TSO office to the optometrist, very similar controls are imposed on the optometrist.[4] Bear in mind that these controls would exist even though the local optometrist would own the business and theoretically "be his own boss." Those controls provide that:

(1) Daily sales reports must be submitted to the Beaumont, Texas office of Dr. Rogers.

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[4]The control is so extensive that it was the basis of an anti-trust lawsuit by Dr. McGuire against Rogers Brothers. A certified copy of the federal court complaint is an exhibit in this case.

(2) The resident optometrist must purchase all optical material, frames, lenses, contact lenses, or prescription work, opthalmic supplies, refracting equipment, and other optical supplies from Rogers Brothers laboratory.

(3) The optometrist must abide by Rogers Brothers rules and policies covering the optometrist's hours of operation, personnel procedures, professional fees, and pricing of eyeglasses and other optical materials. Rogers Brothers controls and dictates policies covering examination of patients; progress examinations; re-examination; and all other policies including the care and continued care of contact lens patients and transfer patients from other TSO offices.

(4) Dr. Rogers can impose a $50 per day fine, or terminate the contract and prevent the use of the TSO name if the resident doctor fails to abide by Rogers Brothers rules and policies.

(5) The optometrist must purchase all his insurance including general liability, workman's compensation, professional liability, fire, hospitalization, and other casualty coverage from a broker designated by Rogers Brothers.

(6) The optometrist must use Rogers Brothers' prescription forms.

(7) The resident optometrist must not compete within certain areas for a period of 5 years from the date their relationship is terminated.

(8) The optometrist must be a member of Rogers Brothers pension plan and various benefit programs such as hospitalization insurance and disability insurance.

(9) The optometrist must participate in TSO advertising, prorata, in accordance with gross receipts. There is no ceiling on the dollar amount or percentage amount which must be contributed to TSO advertising other than the foregoing.

Various other kinds of economic controls and tie-ins are prevalent in commercial optometry. These other types encompass: leasing space or equipment to an optometrist who offices next door to the opticianry; referring patients from the optician to the optometrist; and contracts requiring exclusive use of laboratories.

Economic ties to opticians and/or contracts of this sort are common among commercial optometrists and are non-existant among professional optometrists. (Dr. Riley, A-III, 195). Based on this fact the Legislature might legitimately conclude that TOA members would be less likely to succumb to economic pressures and controls than commercial optometrists.

b. *Dr. Shannon's Testimony.* Dr. Robert Shannon, who was a former owner of the Lee Optical chain in Texas candidly admitted that when he was part owner of the chain, Lee Optical controlled the optometrists employed by him, top side and bottom. He further stated that if one of his Lee Optical optometrists had been a member of the state optometry board, his votes and actions would certainly have been constrained by the fear of being fired if he displeased the owners of Lee Optical.

"Q. If an optometrist who was in your employment at the time that you were part owner in Lee Optical were on

the Texas Optometry Board, would you expect that person to look out for the interest of Lee Optical?

A. You bet.

Q. If that person who was in your employment voted against what you considered to be the best interest of Lee Optical, what would you do about it?

A. I would have a very frank talk with him and try to advise him of what side of the bread he puts the butter on because, in essence, I am paying his salary.

Q. If he didn't eventually come around to what you considered was voting for the best interest of Lee Optical, what would you do; would you fire him?

A. I am sure I probably would, yes. . . . If I didn't fire him, I would make it very unpleasant for him so that he would terminate." (Dr. Shannon, A-II, 159).

The entire deposition of Dr. Shannon is repleat with examples of how optometrists who were with Lee Optical in Texas were under the complete control and dominance of the owners of the Lee Optical chain. Dr. Shannon's deposition exposes the hard facts upon which the 1969 Texas Legislature could have relied in requiring that four TOA members be on the Optometry Board.

Because nearly all commercial optometrists are employed by or affiliated with chains such as T.S.O. or Lee Optical, they are subject to direct or indirect economic pressure from the owner of such chains. T.O.A. members, on the other hand, do not work for

such chains, and therefore are more likely to be economically independent and free from such pressures.

c. *Federal judge/economic independence analogy.* A vivid analogy might easily be made between the requirements of the Texas Optometry Act and the constitutional requirement that all federal judges have life tenure. It cannot be said with certainty that a particular judge would be a better or worse judge if he did or did not have life tenure. However, it was the intent of the Constitution that federal judges be granted the utmost in economic independence in order that their judgments and enforcement of the law be free from dominance or control by the Congress, the President, or the electorate. By analogy, one of the primary purposes of the Optometry Board is to enforce the law. And, as in the case of federal judges, such enforcement can best be accomplished in an atmosphere of economic independence where there is minimal chance of economic repercussions for unpopular decisions and strict enforcement. (Dr. Riley, A-III, 251-254).

In the light of the economic controls traditionally exerted on commercial optometrists, the Legislature might rationally conclude that TOA members are more likely than the non-TOA members to be economically independent and free from outside control. As such, the Legislature had a rational basis for enacting §2.02.

3. *The second rational basis is that TOA members are more likely than non-TOA members to emphasize the highest quality eye care.* There is concrete evidence of legislative awareness of the need for board members whose primary concern is *quality eye care* rather than

high volume and high speed eye care (Dr. Riley, A-III, 237, 241, 249).

Because of the track record of TOA, it is reasonable to believe that TOA members are more likely (as compared to non-TOA members) to emphasize and encourage higher standards and higher quality in eye care. The reasons for this greater probability are summarized in the deposition testimony of Dr. James J. Riley (a former president of TOA), Dr. Nelson Waldman (a former state board member and former TOA president), Dr. Robert Shannon (a former commercialist and owner of the Lee Optical chain), and Dr. Chester Pheiffer (Dean of the College of Optometry at the University of Houston). Their testimony can be summarized as follows:

a. *Length of time for examinations.* TOA members emphasize allowing a sufficient length of time for examinations, whereas the emphasis of the commercial optometrists is on greater volume and speed which nurtures lower quality eye care (Dr. Riley, A-III, 188, 194).

TOA members emphasize more thorough and lengthy examinations for the benefit of the patient. The basic competence requirement takes at least 20 and probably 30 minutes. But the average TOA optometrist probably spends 30 minutes to 45 minutes on the routine patient (Dr. Waldman, deposition pp. 43-44, not in appendix). In contrast, commercial optometry has historically emphasized speed and volume, resulting in greater danger of the examinations being less thorough and accurate (Dr. Riley, A-III, 194). In fact, there are examples where the examinations have been much shorter, sometimes as short as eight or ten minutes (Dr. Shannon, A-II, 122-126).

b. *Appointment rather than waiting in line.* TOA members practice by appointment rather than by a wait-in-line method utilized by commercial optometry (Dr. Shannon, A-II, 106-107). The appointment method encourages a more professional examination since it does not place the optometrist under the gun of losing patients who are waiting in the lobby. The professional optometrist is more free to allocate sufficient time for examinations since they are by appointment; and if an unanticipated problem arises, he is in a less perilous situation if he spills over into the next appointment or asks the patient to come back (Dr. Riley, A-III, 188, 194).

In contrast, in a commercial practice, the no-appointment/wait-in-line method encourages and forces the optometrist to speed up an examination for fear of losing patients waiting in line in the lobby (Dr. Riley, A-III, 194).

c. *Dangers from pressures of high volume.* TOA members are not under pressure of high volume in contrast to commercial optometrists. When optometrists are under pressure to turn out high volumes of patients, there is a tendency for shortcutting or eliminating important aspects of the examination. This can be very harmful to the patient in many ways.

This proposition was covered in great detail in the deposition of Dr. Nelson Waldman, who was formerly chairman of the Optometry Board and whose opinion is based on numerous investigations and hearings on basic competence violations by optometrists. Dr. Waldman in his deposition thoroughly discussed the steps in an optometric exam, in layman's terms, and pointed out the

dangers of exams done in haste for high volume purposes (Dr. Waldman, A-IV, 309-312, deposition 16-30).

d. *No "locked-in" source of supply.* TOA members are not "locked-in" to one single source of supply or one single laboratory (Dr. Riley, A-III, 190). The examining optometrist loses control over quality of lens fabrication when he cannot threaten to quit his laboratory because of poor quality.

A concrete written example of the dangers of a locked-in source of supply is exemplified by the February 15, 1961 letter from Dr. C. T. Shropshire to Lee Optical local offices. Lee instructed their employee optometrists *not* to give prescriptions for certain types of lenses, even if needed or requested by the patient. (Dr. Riley, A-III, 241-246).

e. *Verification of lenses.* TOA members are more likely to verify lenses after they return from the laboratory because they are their own boss and are under less time pressure (Dr. Waldman, A-IV, 308-312; Dr. Shannon, A-II, 109-111). Dr. Shannon testified that a correct examination and a correct prescription is useless if the lens prescription is filled incorrectly.

f. *Properly equipped offices.* TOA membership is a general assurance of properly equipped offices and adherence to the provisions set forth in the TOA code of practice. (Dr. Riley, A-III, 188).

g. *Continuing education.* TOA membership meant and still does mean emphasis on continuing education. TOA fought hard for the creation of the Optometry College at the University of Houston (Dr. Riley, A-III, 188) and

was primarily responsible for the passage of a bill to make continuing education mandatory for license renewal (Dr. Riley, A-III, 191-192). Before the passage of the continuing education statute, TOA was active in continuing educational seminars in regional and statewide conventions (Dr. Riley, A-III, 190-191).

In contrast, it was the testimony of Dr. Rogers that he personally opposed the continuing education law and that it was his intention to encourage the Texas Association of Optometrists (primarily composed of commercial optometrists) to challenge the statute in court as being unconstitutional. (Dr. Rogers, deposition p. 247, Dr. Riley, A-III, 198-199). Sure enough, several weeks after Dr. Rogers made this statement during his deposition, the Texas Association of Optometrists filed suit to challenge the constitutionality of that statute.

h. *Strong doctor/patient relationship.* TOA members are more apt to maintain quality care because of a strong doctor/patient relationship unlike commercial optometrists (Dr. Riley, A-III, 188-189). TOA members traditionally emphasize a close professional relationship between doctor and patient, while in commercial optometry, it is rare for a patient to even know the name of the particualr optometrist attending him (Dr. Shannon, A-II, 112-113). When there is no strong doctor/patient relationship and the doctor's identity remains relatively anonymous, the optometrist logically feels less responsible and less fearful of repercussions from the patient's dissatisfaction.

In conclusion, TOA optometrists, as opposed to commercial optometrists, place great emphasis on a strong doctor/patient relationship. Unlike commercial optometrists,

they emphasize the importance of allowing adequate time for examinations and consequently utilize appointment scheduling rather than wait-in-line, high volume, high speed practice. TOA members, unlike commercialists, are not locked in to any source of supply of optical lenses and emphasize lens verification. Consequently, since TOA members emphasize high quality eye care in their own practice, they are more likely to emphasize and encourage the highest quality eye care if they are appointed members of the Optometry Board. As such the Legislature had a rational basis for enacting §2.02.

4. *The third rational basis is that TOA members are more likely than non-TOA members to enforce the Texas Optometry Law.* Historically, TOA was responsible for the Legislature's adoption of the first Optometry Act in the early 1900's; and TOA has been heavily involved in legislative efforts to up-grade the quality of eye care (Dr. Riley, A-III, 190-191).

In contrast, commercial segments of optometry, represented primarily by Lee Optical and Texas State Optical, have been on the other side of the coin in the courthouse for years, unsuccessfully contesting the validity and constitutionality of board rules, state statutes, and board enforcement of those rules and statutes. A summary of some fourteen lawsuits in which commercialists have challenged the Texas optometry laws is contained in the Appendix to this brief at page 54.

These lawsuits, including a recent suit to declare the continuing education statute unconstitutional, show a consistent history of commercial optometry's repeated attempts to stymie board enforcement of the optometry laws. From this history, the legislature might well have

concluded that TOA members were more likely than commercial optometrists to enforce the Texas Optometry Act.

The legislature's rationale that TOA members are more likely to enforce the Texas optometry law than commercial optometrists is further buttressed by the fact that many of the commercialists have been philosophically and actively opposed to the professional responsibility rule of the Texas Optometry Act (§5.13). That rule prohibits fee splitting with laymen and other optometrists; it prohibits gross absenteeism by the optometrist; and it prevents deception with regard to listing of the optometrist's name at offices at which he does not actually practice. Commercial optometry's opposition to this rule is evidenced by their repeated efforts to destroy it by litigation (see list of cases in the Appendix to this brief at p. 54) and by attempts to have the rule repealed.

One of the most significant examples of commercial optometry's opposition to the Texas optometry law occurred in 1968 immediately prior to the enactment of the current law. At that time, the Texas State Board of Examiners in Optometry was the agency charged with regulating optometry in Texas. That board, unlike the current optometry board, had rule making powers as well as enforcement powers. One of the rules which the board of examiners had adopted was a professional responsibility rule substantially similar to the current §5.13, (Dr. Riley, A-III, 207-208).

In 1967 Dr. Rogers sat on the board of examiners. Also, two TOA optometrists sat on the board, and there were two vacancies. Governor John Connally appointed two commercial optometrists, Dr. Dan Geller and Dr. C.

T. Shropshire, to fill the vacant positions. With these appointments, commercial optometrists held a majority on the Texas Optometry Board (Dr. Riley, A-III, 205).

In 1968, at a board meeting in which a quorum was not present, the commercial optometrists purported to elect Dr. Rogers president of the board. At that same meeting, also without the presence of a quorum, the three commercial optometrists purported to repeal the professional responsibility rule and sent letters to all optometrists in the state announcing that the rule had been repealed. (Dr. Riley, A-III, 206, Dr. Rogers' Second Deposition pp. 75-80).

The Texas legislature responded swiftly. In 1968, the Texas Senate refused to confirm Dr. Geller and Dr. Shropshire to the Board of Examiners. In 1969, the legislature abolished the Board of Examiners, replacing it with the present Optometry Board. This new board was denied all rule-making and rule-changing powers and was assigned instead the task of enforcing optometry law as passed by the Legislature. At the same time, the Legislature enacted the professional responsibility rule into law. (Dr. Riley, A-III, 216, Tex.Rev.Civ.Stat., Art. 4552 §6.01, §2.01, §2.14, §5.13).

This particular episode, perhaps more than any other, evidences the Legislative awareness that commercial optometry was hostile toward enforcement of Texas Optometry law. (Dr. Riley, A-III, 236-237). The Legislature's action in requiring that at least four of the members of the new board be TOA members was rationally founded on the Legislature's belief that TOA members were more likely than commercial optometrists to enforce the optometry law in Texas.

On the basis of the evidence presented to the court of the history of commercial optometry's opposition to the Texas Optometry Law and of TOA's support of the Texas Optometry Law, the court correctly concluded that the Legislature could have determined that TOA members are more likely to enforce the optometry laws as written by the Legislature. As such, the Legislature had a rational basis for enacting §2.02.

5. *The Legislature was actually aware of these rational bases for §2.02.* The foregoing rationales for §2.02 in the 1969 Optometry Act were not "created" for this lawsuit. Quite the contrary. All of these arguments were asserted by members of TOA in the 1968 legislative election and in the 1968 Texas Senate battle over the appointments of Dr. Dan Geller and Dr. C. T. Shropshire to the Board of Examiners. Drs. Geller and Shropshire (both associated with Lee Optical) had been appointed by Governor John Connally in late 1967. TOA members fought their confirmation with the facts and arguments set forth earlier in this brief. This information was actually communicated to the members of the Texas Senate. This was presumably one of the reasons why neither optometrist was confirmed by the Senate (Dr. Riley, A-III, 210-213).

These arguments were also communicated to the candidates in the Texas House and Senate legislative races in 1968. (Dr. Riley, A-III, 210). Lastly, TOA members all over the state of Texas argued these facts successfully with the members of the Texas House and Senate during the passage of the 1969 Optometry Act (Dr. Riley, A-III, 235-254). Part and parcel of these arguments to the Legislature was the fact that commercial optometrists were not members of the Texas Optometric Association.

On the basis of the foregoing analysis, the lower court was justified in finding that §2.02 was founded on a rational basis.

II. THE THREE-JUDGE FEDERAL COURT CORRECTLY HELD THAT §2.02 DOES NOT DEPRIVE APPELLANT DR. ROGERS OF DUE PROCESS OF LAW.

A. *Section §2.02 is not invalid under the theory of substantive due process.* Dr. Rogers asserts that §2.02 is unconstitutional under the doctrine of substantive due process in that §2.02 allegedly creates an irrebuttable presumption that non-TOA members are less qualified to serve on the board than TOA members.

The court below properly rejected such reasoning, noting that the cases cited as supporting authority by Dr. Rogers all involved fundamental rights which are more stringently protected than non-fundamental rights. The court held that in this case, as in other non-fundamental rights cases which involve state regulation of economic matters, the rational basis test of *New Orleans v. Dukes,* supra, and *Williamson v. Lee Optical,* supra, is to be applied. Applying this rational basis test, the court found that the Legislature clearly had a rational basis for enacting §2.02.

However, Dr. Rogers argues that his "fundamental right" to serve on the majority of the Optometry Board is deprived, and therefore, an irrebuttable presumption analysis is appropriate. Dr. Rogers' argument is erroneous for several reasons. First, there is no consititutional right to be in the majority on any governing body. If this were so, then many government boards in ex-

istence would be unconstitutional, and an Optometry Board of almost any composition would be unconstitutional. For example, an Optometry Board composed of four commercial optometrists and two professional optometrists would be unconsititutional in that the professional optometrists would be in the minority. A board composed of four optometrists and two consumers would be unconstitutional in that the consumers would be in the minority. Dr. Rogers fails to recognize that there is no constitutional right to be in the majority on a board. Since fundamental rights are not involved in this case, an irrebutable presumption analysis is inappropriate. *Weinberger v. Salfi, 422 U.S. 749 (1975).*

Dr. Rogers' irrebuttable presumption analysis is furthermore inappropriate in that, unlike any other irrebuttable presumption case, §2.02 does not irrebuttably prevent any person from sitting on the board. While four of the six board members must belong to TOA, non-TOA members may fill the other seats on the board. As the court below noted, §2.02 "does not conclusively deny any person a board seat." 438 F. Supp. 428, 433. In other words, §2.02 does not irrebuttably presume that a non-TOA member is less qualified to serve on the board. The fact that a non-TOA member may still serve on the board is dramatically illustrated by the fact that Plaintiff Dr. Rogers, a non-TOA member, is himself currently serving on the Board and has been for over 20 years. Section 2.02 is not unconstitutional on the basis of a substantive due process/irrebuttable presumption analysis.

However, assuming arguendo that §2.02 is subject to a substantive due process argument, Dr. Rogers lacks the requisite standing to raise the issue. Dr. Rogers currently sits on the Texas Optometry Board and did at the time

this suit was filed. Consequently, he has suffered no harm from any irrebuttable presumption §2.02 might raise. Since Dr. Rogers has suffered no direct injury from §2.02, and since it is clear that §2.02 is constitutional as applied to him, Dr. Rogers lacks standing to assert an irrebuttable presumption objection to §2.02. *U.S. v. Raines* 362 U.S. 17, 21-24 (1060).

B. *Section 2.02 does not violate Dr. Rogers' right to procedural due process.* Dr. Rogers next asserts that §2.02 is invalid under a theory of procedural due process, alleging that the Optometry Board under §2.02 is inherently biased. Dr. Rogers relies heavily on the reasoning in *Wall v. American Optometric Association, Inc.* N. D. Georgia 1974 (3-Judge Court) 379 F. Supp. 175, aff'd. 419 U.S. 888 (1974) and *Gibson v. Berryhill,* 411 U.S. 564 (1972). He asserts that because the board has a majority of TOA members, the board is inherently biased against non-TOA members, and therefore §2.02 is unconstitutional as depriving Dr. Rogers of procedural due process.

The lower court correctly overruled Dr. Rogers' contention, citing the language of *Wall* that, "there is no federal constitutional requirement to the effect that legislators and rule makers must be free of bias or interest." 438 F. Supp. 428. The three-judge court further pointed our that the case at bar is readily distinguishable from both *Wall* and *Gibson* in that:

(1) Those cases were brought *after* the optometry boards in question had brought charges against the optometrist plaintiffs, and therefore, they speak only to the due process issues which surround disciplinary adjudications.

(2) In those cases the boards had rule-making power which they had exercised, while in the instant case the Texas board has no rule-making power to enforce what the Legislature has mandated, and

(3) In *Wall* and *Gibson* all members of those boards were members of the state optometric association, while in the case at bar one-third of the board is composed of non-TOA members. 438 F. Supp. 433.

The lower court was correct in rejecting Dr. Rogers' procedural due process challenge. The *Wall* and *Gibson* cases heavily relied on by Dr. Rogers involved a court determination of *actual bias* of particular board members who were seeking to enforce a specific law against other optometrists. Those cases were brought after disciplinary proceedings had been initiated. Therefore, it was possible for the courts in those cases to make a factual determination that members of the Optometry Board in question were in fact biased as to those particular defendants in that particular proceeding.

In stark contrast, the case at bar does not arise out of a disciplinary proceeding. No question is raised as to whether the Texas Optometry Board is biased as to any particular defendant or in any particular case. Dr. Rogers is asserting that §2.02 makes the Texas Optometry Board unconstitutionally biased toward *all* non-TOA members and in *all* cases. Dr. Rogers asserts that the TOA members of the board must be constructively presumed to be biased and that it must be constructively presumed that their bias is so pronounced as to render every action taken by the board invalid. Dr. Rogers' reasoning is flawed in several significant ways.

1. *Bias must be proven on a case by case basis.* First, bias is not something that is constructively presumed. Bias must be proven in any particular case on a case by case, person by person basis. Bias in any particular case is a question of fact which must be determined based upon the facts of the individual case. Since the case at bar does not arise out of a particular proceeding where the relevant facts are known, the court below properly refrained from determining whether or not the Optometry Board was biased.[5]

In any hearing to determine the bias of a disciplinary body, it would be necessary to determine (1) the nature of the disciplinary action sought, (2) the identity of the particular person being disciplined, and (3) the biases of the individual board members and of the board as a whole.

All three of these elements were fixed and known in the *Wall* and *Gibson* cases upon which the Plaintiff relies.

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[5]It should be particularly noted that this case did *not* arise out of a disciplinary proceeding. Dr. Rogers, however, asserts that in the future the Texas Optometry Board is likely to enforce the Texas Optometry Law and, therefore, is likely to bring disciplinary proceedings at some time in the future against Dr. Rogers. First, there is no action pending against Dr. Rogers, and any assertion that there will be in the future is pure speculation. Secondly, even if future actions were brought against Dr. Rogers, the nature of the charges against him and the individual identity of the board members at that time is not yet established. Without such information, it would be impossible to make a factual determination of bias in advance. As the court below noted, if in the future the board does bring an action against Dr. Rogers and he does feel the board is biased against him, he is free to assert that contention at that time. At that time evidence could be taken as to the actual bias of known board members toward a known defendant during a proceeding in which the nature of the case is also known. This Court is not the appropriate forum to hear such arguments at this time since the evidence gathered for this cause has focused upon the constitutional legal issues rather than upon the factual question of bias in any particular case.

None of these elements is fixed and known in the case at bar. Nevertheless, Dr. Rogers asks this Court to declare §2.02 unconstitutional on the basis that in some unspecified case in the future in which the nature of the case and the parties are not yet known, and in which the identities of the Board members are also unknown, a TOA dominated board might be biased toward the parties. This Court should not declare §2.02 unconstitutional on such a basis. Because this case has not arisen out of a disciplinary proceeding, these elements which are necessary for a fair determination of bias are not yet fixed and therefore, cannot be fairly balanced by the Court. Such facts can only be fixed after a particular disciplinary proceeding has been brought and after the particular parties in question are known. Therefore, the court below properly concluded that a bias analysis was not appropriate unless it arose out of a particular disciplinary proceeding where the parties and charges are known.

2. *Bias cannot be constructively presumed based solely on membership in a professional association.* Although bias must ordinarily be proven on a case-by-case, person-by-person basis, Dr. Rogers argues that the requirement that four members of the Texas Optometry Board belong to the TOA constitutes such inherent bias as to make the board unconstitutional in all cases. This argument is based upon the assumption that all TOA members are biased against all non-TOA members. This assumption is erroneous. TOA is composed of hundreds of individuals, and each individual is different. While there may be some TOA members who carry a bias toward non-TOA members, it can be stated with great certainty that there are hundreds of TOA members who have no such bias. Similarly, while there are some non-TOA members who have biases against TOA members, the vast majority probably do not. Bias varies from individual to individual, and an

individual may not automatically be deemed biased simply because he belongs to a particular organization.

Bias should not be constitutionally "presumed" based merely upon an individual's affiliation with a particular organization. It should be noted that in both the *Wall* and *Berryhill* cases, on which Plaintiffs rely, bias was not assumed and was not an automatic result of the organizational ties of the board members. In the *Wall* case it was especially clear that organizational affiliations did not render the Alabama Optometry Board inherently biased. The Court concluded that the board's action in adopting a rule against corporate practice was valid and not subject to attack for pecuniary bias, even though every member of the board belonged to the Alabama Optometric Association. The Court's objection to the board make-up went only to the board's bias, *proven at trial,* in enforcing the rule. Logically, if the organizational affiliations had been sufficient to make the Alabama Board inherently biased as a matter of law, all actions of the Optometry Board would have been unconstitutional including the adoption of the corporate practice rules. However, the Court recognized that mere membership in a professional organization is not enough to inherently render a person biased. Such bias must be proven as to each particular individual and as to each particular proceeding. Membership in an organization does not automatically render all members biased against all nonmembers in all proceedings.

However, if this Court were to accept Dr. Rogers' argument that membership affiliation or non-affiliation alone is enough to determine bias, then it could effectively mean that any board, whatever its make-up, would be unconstitutional because of bias. For example, where does this argument lead if the AOA affiliation require-

ment were invalidated and the Governor continued to appoint four TOA members and two non-TOA members to the Board? Under Dr. Rogers' theory, the board would still be unconstitutional because the majority TOA members must be presumed biased. Or the Governor might appoint four commercial optometrists who are not members of TOA and two professional optometrists who are members of TOA. Is the board's make-up then to be unconstitutional because there is a majority of commercial optometrists on the board and such majority is presumed inherently biased against professional optometry? The court below correctly determined that membership affiliation alone does not determine bias.

3. *Dr. Rogers' pecuniary bias argument is faulty.* Dr. Rogers has argued that the requirements that four members of the Texas Optometry Board belong to TOA creates a board that is inherently biased against non-TOA members for pecuniary reasons. Dr. Rogers argues that if the Texas Optometry Board ever revokes the license of a non-TOA member, then the TOA board members would be financially benefited because some of the patients who otherwise would have gone to the optometrist who was disciplined might now go to TOA optometrists. This reasoning is faulty for several reasons. First, there is no guarantee that the patients of this hypothetical optometrist would patronize TOA members as opposed to non-TOA members. They would be just as likely to patronize a non-TOA member. Secondly, even if some of the patients did patronize another TOA member, such patronage would be of no pecuniary benefit to the optometry board member since all TOA members are themselves in competition with one another, all being competing members within the same profession. Thirdly, Dr. Rogers' pecuniary bias argument does not speak to

whether or not TOA or non-TOA members should sit on the board. It speaks only to the question of whether or not one *optometrist* may sit in judgment of another optometrist. Any time one optometrist's license is revoked, other optometrists have one less competitor, and *all optometrists,* regardless of membership or non-membership in TOA, theoretically benefit. Consequently, if there is pecuniary bias inherent in the Optometry Board, such bias exists by virtue of the fact that the board members are optometrists, not by virtue of their being members or non-members of TOA. Dr. Rogers is challenging §2.02 for its TOA/non-TOA provisions, and therefore a pecuniary bias analysis is not appropriate to that challenge. Section 2.02 does not unconstitutionally create a board that is pecuniarily biased.

The court below correctly determined that bias must be determined on a case by case basis and that mere membership in the TOA does not render a board member inherently biased. The court below was correct in holding that §2.02 does not violate procedural due process

III. SECTION 2.02 IS NOT INVALID AS BEING VIOLATIVE OF THE FIRST AMENDMENT FREEDOMS OF SPEECH AND ASSOCIATION.

A. *Senior Citizen's First Amendment right to commercial information is not impaired by §2.02.* Appellant Senior Citizens originally challenged §2.02 as an unconstitutional infringement on their First Amendment right to consumer information. This challenge was based on the theory that a board with four TOA members was more likely to enforce the anti-advertising laws then in effect, and thereby more likely to deprive them of their rights.

Such claim, however, is now moot. At the time this suit was brought by Senior Citizens, §5.09 of the Optometry Act prohibited price advertising by optometrists. In this same lawsuit below, appellant Senior Citizens challenged that section as being an unconstitutional infringement on its First Amendment right to consumer information. In the light of this Court's decision in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), the three-judge court below determined that §5.09 is unconstitutional and enjoined its enforcement. No appeal has been taken from that part of the decision below.

After the court decision permitting price advertising by optometrists, the three-judge court below correctly determined that Senior Citizens' First Amendment challenge of §2.02 was mooted. The Optometry Board was enjoined from enforcing the prohibition on price advertising and as such the composition of the Optometry Board became irrelevant to Senior Citizens' First Amendment claims. *Under the law as it now stands, optometrists may price advertise and Senior Citizens is not deprived of its right to such information,*

However, by this appeal Senior Citizens urges that, despite the new status of the laws, Senior Citizens is still deprived of its First Amendment right to receive commercial information. Its reasoning follows these lines: Section 2.02 requires the Optometry Board to be composed of at least four TOA members. In the pre-*Bates* days, TOA members pressed to enforce the law that was then on the books prohibiting price advertising. Because TOA members enforced §5.09 in the days before it was declared invalid, Senior Citizens fears that the TOA members of the board might ignore the federal court order and might attempt to enforce §5.09 anyway, either directly or indirectly by harassment of advertising

optometrists. Senior Citizens argues that if the TOA board members do this it might have a chilling effect on the optometrists who advertise. Therefore, Senior Citizens might not receive all of the consumer information they might otherwise have received. Senior Citizens argues therefore, §2.02 is unconstitutional because it is an unwarranted infringement upon Senior Citizens' right to receive information.

This argument is erroneous for several reasons. First, the contention is based upon little more than speculation. Senior Citizens has not shown that it has suffered any actual harm from the composition of the Board, and it has not even shown that there is a likelihood of such harm. They have only asserted that *if* the board members choose to violate the court order concerning price advertising, then Senior Citizens *might* suffer harm. The harm asserted is too speculative to warrant declaring §2.02 unconstitutional.

Secondly, Senior Citizens' argument is based upon the speculative and erroneous assumption that the four TOA members on the board will disobey the lower court order or will otherwise seek to undermine the court's decision on price advertising. This assumption is clearly unwarranted. Members of the Optometry Board are sworn to uphold the law. To assume that they will do the contrary is to accuse the members of the board of violating their oaths of office. And to argue that the board itself is *unconstitutional* because the members thereof *might* not enforce the law they are sworn to enforce is, to say the least, extremely tenuous.

The Optometry Board has been permanently enjoined by court order from enforcing the ban on price advertising. If the board fails to obey, they are subject to

contempt proceedings. As such, Senior Citizens' right to receive price information is adequately protected.

However, Senior Citizens' rights have been afforded even greater protection by a recent FTC ruling.[6] That ruling provides that it is unlawful for any governmental body to restrict the advertising of *any* optometric information, not just price information. As a result, even if a government board did have a predisposition against advertising, they are now prohibited from restricting advertising in any way, direct or indirect. Consequently, the composition or alleged predisposition of the Optometry Board becomes irrelevant to whether or not advertising information is restricted.

The order of the court below authorizing price advertising and the recent FTC ruling prohibiting any limits on advertising by optometrists have totally mooted Senior Citizens' assertion. The composition of the Optometry Board does not serve to deprive Senior Citizens of their First Amendment right to commercial information.

B. *Dr. Rogers' First Amendment rights are not impaired by §2.02.*

1. *This issue was not raised or tried in the court below.* In his jurisdictional statement to this Court, Dr. Rogers for the first time raises the complaint that his First Amendment rights are violated by §2.02. Although

[6]Federal Register, Vol. 43, No. 107, p. 23992 at 24006-24008, (June 2, 1978), Trade Regulation Rules — Advertising of Opthalmic Goods and Services. For the convenience of the Court these rules have been reproduced in the appendix to this brief at page 60.

Senior Citizens has from its first entry into this lawsuit asserted that *their* First Amendment rights to consumer information may have been impaired by §2.02, Dr. Rogers did not assert in the court below that *his* First Amendment rights to free speech and association were impaired by §2.02. The first time Dr. Rogers raised this issue was in his jurisdictional statement to this Honorable Court. The issue was not pleaded, briefed or argued in the court below. Evidence was not taken on the issue, and the lower court's opinion did not address the issue. Consequently, this new issue is not properly before this Court and this Court should decline to consider it. *Singleton v. Wulff,* 428 U.S. 106 (1976).

a. *This issue was not pleaded in the lower court.* For the convenience of this Court the pleadings to the lower court have been reproduced in the appendix of this lawsuit at A-I, 8-16. The sections of Plaintiff's complaint dealing with §2.02 are contained on pages A-I, 9-11. While Plaintiff Dr. Rogers asserts in that complaint that §2.02 "deprives your plaintiff of constitutional equal protection and due process," the complaint at no time alleges that Dr. Rogers' First Amendment rights to free speech or association have been violated by §2.02. (A-I, 11). This issue was never pleaded or otherwise raised in the Court below.

b. *Evidence was not taken regarding this issue.* Because this issue was first raised with the filing of Plaintiff's Jurisdictional Statement in this Court, Defendants were never given an opportunity in the court below to discover and present evidence which might speak to this new issue. Consequently, the evidence necessary to fully and fairly decide this new issue is not now before this Court.

Although Plaintiff would rely on evidence that was gathered on other issues in this lawsuit, it would not be fair to decide this lawsuit based only on evidence which was gathered in support of other issues and which incompletely and tangentially speak to this new issue. If this new issue is to be tried via this lawsuit, Defendants should be given the opportunity to discover and present evidence relevant to the new issue. Consequently, it would not be appropriate for the Court to consider this new issue at this time.

c. *The issue was not briefed by the parties below.* Although the briefs below were voluminous, *not once* in more than 240 pages of briefing did Plaintiff Dr. Rogers assert that §2.02 violated his First Amendment rights. All of Plaintiff's briefing and all of Defendants' briefing centered around equal protection and due process objections.[7] The question of Dr. Rogers' First Amendment rights were not briefed below. Defendants should be given the opportunity to research and brief this new issue based upon a firm foundation of evidence gathered for that purpose. It would be imprudent for this Court to consider this issue here, for the first time, without the proper foundation of evidence and briefing in the court below. The matter would be best raised in a separate lawsuit.

d. *The court below did not address the issue.* Because the issue was never raised in the court below and because

[7]Dr. Rogers is in error to assert that TOA briefed the First Amendment issue as it applied to Dr. Rogers. In TOA's brief in the court below, the many issues of the lawsuit were broken down in chart form as to statute, the constitutional challenge, and the party asserting the challenge. (TOA brief, pp. 2-3). From this chart and from the text of the brief it is clear that only Senior Citizens asserted any First Amendment challenge to §2.02.

evidence, briefs, and arguments on the issue were not presented, the court quite naturally did not address the issue in its option and judgment below. The court did address the question of whether Dr. Rogers' equal protection or due process rights had been violated. And the court did address the assertion by Senior Citizens that its First Amendment rights to commercial information were infringed. But the simple fact is that the issue of a possible violation of Dr. Rogers' First Amendment rights of free speech and association was not tried in the court below. Since the issue was not pleaded in the court below, since the Defendants were not given the opportunity to present evidence on this issue, and since the issue had not previously been argued or briefed, it would not be fair to the parties involved to try this issue for the first time at this high appellate level. This Honorable Court should decline to consider this new issue.

2. *Section 2.02 does not impair Dr. Rogers' rights to free speech and association.* Even if this Court should determine that the question of Dr. Rogers' rights to free speech and association are properly before this Court, §2.02 does not impair those rights. Dr. Rogers alleges that his First Amendment rights are impaired by §2.02 because he is forced to make a choice between either the free exercise of his rights to speech and association or the opportunity to be a member of the "majority" of the Optometry Board. He asserts that because he is forced to make this choice, §2.02 is unconstitutional as violating the First Amendment. This analysis is incorrect.

a. *Dr. Rogers is not precluded from "majority" membership.* The entire basis of Dr. Rogers' First Amendment argument is that §2.02 somehow forces him to forego his First Amendment rights if he wishes to serve

on the "majority" of the Optometry Board. It is important to note that Dr. Rogers is not asserting that the opportunity to serve on the board is denied him, or that he must forego any rights before he can be appointed to the board. His only argument is that he is somehow deprived of being part of the majority on the board.

The fundamental error of Dr. Rogers' assertion is that the monolithic "majority" Dr. Rogers seeks to join does not exist. The Texas Optometry Act created a board composed of six members. Four of the six positions on the board must be filled by individuals who meet the qualification of belonging to an optometric association affiliated with the American Optometric Association, i.e., to the T.O.A. Section 2.02 does not require that the four individuals who belong to TOA must vote alike or that the four must vote against the two non-TOA members. Each individual is sworn to vote his conscience with the best interest of the State in mind at all times. *Section 2.02 does not require that a particular board member ever vote a particular way.*

As a result there is no absolute, unchanging "supermajority" as Dr. Rogers alleges. The "majority" of the Texas Optometry Board varies with each vote that is taken and with each issue that is considered by the board. As to any particular issue or any particular vote, an Optometry Board member may find himself in the majority or minority of the board. Whether or not he finds himself in the majority has nothing to do with his membership or non-membership in TOA.

In his twenty years on the board, Dr. Rogers has himself been in the majority on numerous occasions and

in the minority on other occasions. Similarly, any particular TOA member has found himself in the minority on some occasions, while in the majority on others.

Dr. Rogers' assertion that he is deprived of the opportunity to be on the "majority" of the board is essentially meaningless since the majority varies from issue to issue and vote to vote. Consequently, his argument that he must abdicate his First Amendment rights in order to become a part of that majority is likewise unsound and should not serve as a basis for declaring §2.02 unconstitutional.

b. *Dr. Rogers' right to commercial free speech is not impaired.* Assuming, however, that there were some right to be on the "majority" of the Optometry Board, Dr. Rogers is incorrect in asserting that he must forego his right to commercial free speech in order to be on that majority. Dr. Rogers asserts that to be a member of TOA or AOA, one must abdicate his right to advertise. This is absolutely wrong.

The TOA By-laws and Code of Ethics do not prohibit members from advertising or making any other lawful exercise of their First Amendment rights. While in pre-*Bates* days, TOA members did emphasize non-advertising, that emphasis has been eliminated and the TOA bylaws now leave members free to advertise or not advertise as they choose.[8] The TOA By-laws and Code of Ethics

[8]The text of Article XIV of the current TOA By-laws defining "professional conduct" is reproduced in the appendix of this brief at page 58. Also, the TOA Code of Ethics, is reproduced at page 59. Furthermore, note that there are no limits whatsoever to member advertising. The "practice evaluation system" complained of in Appellant's Brief at page 24 was discontinued by TOA in May of 1974.

make no reference one way or another to advertising, and the decision to advertise or not is completely left with the individual optometrist. A member of TOA does not, as Dr. Rogers asserts, abdicate any rights to advertise or to otherwise exercise his free speech right.

Similarly, as the American Optometric Association pointed out in its Amicus Curiae brief filed with this Court, the AOA does not limit advertising or restrict communication of commercial information by its members. Again, it is true that at one time AOA discouraged advertising by its members (see the old AOA Code of Ethics and Supplements at A-IV, 399-416). However, AOA like TOA has changed with the times, and now leaves the decision to advertise or not solely in the hands of the individual optometrist. The only reference to advertising in the current AOA Standards of Conduct reads "an optometrist should honor the applicable provisions of valid state and federal rules regarding the advertising of ophthalmic materials and the disseminating of information regarding professional services." (American Optometric Association Amicus Curiae brief, page 17). Consequently, neither membership in AOA or TOA forces a member to abrogate his First Amendment rights as Dr. Rogers alleges.

Since optometrists are not forced to sacrifice their First Amendment rights upon joining TOA, Dr. Rogers is incorrect to assert that §2.02 forces him to abdicate his right to commercial free speech.

c. *Dr. Rogers' rights to association are not impaired.* Dr. Rogers' next assertion is that §2.02 violates his First Amendment rights of free association. He argues that if he either chooses to associate with a group other than

TOA or if he simply chooses *not* to associate with TOA, then he is precluded from being on the "majority" of the Board. This assertion is also incorrect.

Dr. Rogers is incorrect to assert that he loses the opportunity to be on the "majority" of the Board if he chooses to associate with a group other than TOA. This assertion is apparently based upon the assumption that if Dr. Rogers chooses to join another association, he is precluded from joining TOA. This is simply not true. There is nothing that prohibits members of TOA from belonging to any other professional optometric association or to any other organizations of any kind. As has been pointed out previously, there are several members of TOA who also belong to the other state optometric association, TAO. Membership in TOA does not in any way restrict an optometrists' right to be associated with any other group. Consequently, the first infringement alleged by Dr. Rogers, i.e., that in order to become a member of TOA one must forego the right to associate with other groups, is without merit.

Dr. Rogers' next assertion is that, in order to be a member of the majority on the Optometry Board, he is forced to associate with TOA, and that thereby his freedom not to associate is impaired. This also is erroneous. As has been pointed out previously, if Dr. Rogers chooses not to associate with TOA he is not precluded from the opportunity of serving on the Optometry Board. This is graphically demonstrated by the fact that Dr. Rogers is currently serving on the Board and has been for years. Furthermore, his right to serve on the "majority" is not imparied, since, as has been previously pointed out, the majority of the board is not an absolute

and unchanging thing. It shifts with each vote and each issue. Dr. Rogers has, in fact, been a member of the "majority" of the board on numerous occasions without sacrifice of any freedom of association.

However, assuming that Dr. Rogers does have some right *not* to associate with TOA, and assuming that his right is somewhat impaired by requiring that 4 of the 6 Optometry Board members belong to TOA, Dr. Rogers' rights are not being impaired significantly enough to warrant declaring §2.02 unconstitutional. The only harm he suffers when he chooses to assert his right not to associate with TOA is the very vague and questionable harm of not being able to be a member of the theoretical "majority" of the Optometry Board. This vague and theoretical harm is hardly significant enough to outweigh the state interests served by §2.02 which were enumerated in the first section of this brief. This Court should not declare §2.02 unconstitutional as violative of Dr. Rogers association rights on such a basis.

In summary, even if this Court were to determine that the question of Dr. Rogers' First Amendment rights were properly raised in the court below, the merits of the case show that no violation has occurred. Any alleged infringement supposedly occurs by virtue of requiring an optometrist to choose between "majority" membership on the board and his First Amendment rights. This argument falls flat when one realizes that the first choice, majority membership on the board, is actually artificial. TOA membership does not dictate that such member is part of the majority in any given instance. The majority varies from issue to issue and vote to vote. Furthermore, the supposed abdication of First Amendment rights al-

leged by Dr. Rogers does not in fact occur. As has been shown, membership in TOA and AOA is not conditioned upon non-advertising or upon the sacrifice of any free speech or associational rights. Furthermore, Dr. Rogers' First Amendment associative rights are not significantly impared by §2.02. Consequently, §2.02 does not unconstitutionally infringe on Dr. Rogers' First Amendment rights.

C. *Recent FTC rules have mooted the First Amendment questions raised by §2.02.* On May 24, 1978, the Federal Trade Commission issued regulations which directly affect and moot the First Amendment questions raised in this lawsuit.[9] Those regulations, which went into effect in July of 1978, prohibit any person from limiting in any way the use of newspapers, telephone directories, window displays, signs, television, radio, or any other medium to communicate to the public any information concerning the cost and availability of ophthalmic goods or services. The regulations provide that any state laws which do limit such dissemination of information are preempted, and the rules prohibit state officials from enforcing any such laws. The Regulations further provide that no professional optometric association may in any way limit advertising or other communications by its members, and such associations may not condition membership upon any agreement which limits advertising in any way.

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[9]Federal Register, Vol. 43, No. 107, p.23992 at 24006-24008, (June 2, 1978), Trade Regulation Rules — Advertising of Opthalmic Goods and Services. For the convenience of the Court these rules have been reproduced in the appendix to this brief at page 60.

These Regulations, which prohibit any person from limiting an optometrist's freedom to disseminate commercial information, have mooted the First Amendment questions raised by Dr. Rogers and Senior Citizens against §2.02. The members of the Texas Optometry Board could not prevent an optometrist from exercising his First Amendment rights now even if they wanted to. The board members are prohibited from enforcing any state laws or taking any other action which might have the effect of limiting communication in any way. Whether or not a board member belongs to an association which is supposedly hostile to advertising now becomes irrelevant since board members no longer have the right to enforce any limits on advertising.

Similarly, for First Amendment purposes, it becomes irrelevant whether or not a board member belongs to any particular professional association since *all* associations are now prohibited from limiting advertising and from conditioning membership on non-advertising.

With the implementation of these new FTC regulations, any infringement on Plaintiff's First Amendment rights which might have resulted from §2.02 is prevented. The provisions of §2.02 of the Texas Optometry Act, no longer have even the slightest effect on Plaintiff's First Amendment rights to free speech. Therefore, any First Amendment objection to §2.02 is rendered moot.

IV. SENIOR CITIZENS' SUPREMACY CLAUSE/ SHERMAN ANTI-TRUST ASSERTION IS IMPROPERLY RAISED AND WITHOUT MERIT.

A. *Appellant's arguments are fallacious.* In Appellant's brief on the merits in this Court, Senior Citizens raises,

admittedly for the first time at any stage of this case, the assertion that §2.02 is invalid as violating the Supremacy Clause and the Sherman Anti-Trust Act. Senior Citizens alleges that the Sherman Act prohibits private restraints on trade, that TOA restrains trade because it supposedly prohibits its members from advertising, that the State of Texas "bestows the powers of government" on TOA through §2.02, and that therefore, §2.02 is in conflict with the Sherman Act and is therefore, invalid under the Supremacy Clause. This argument is totally without merit.

Speaking briefly to the merits, it is enough to say that neither TOA nor AOA prevent its members from advertising and that the FTC rules prohibit such in any event. (See Section III of this brief, *supra.*) Consequently there is not and cannot be a resulting restraint of trade. Furthermore, the State of Texas does not "bestow the powers of government" on TOA. The six members of the Texas Optometry Board are appointed by the governor and confirmed by the Senate. TOA does not select the Board nor run it in any way. Finally, for the Supremacy Clause to invalidate a state law, there must be a clear and definable conflict between the state and federal laws, *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 45 (1966). Section 2.02, which sets qualifications for membership on a state board, and the Sherman Act, which prevents private restraints on trade, do not evidence the clear conflict which invokes supremacy clause analysis.

B. *This issue was not raised in Appellant's Jurisdictional Statement.* As Senior Citizens' readily admits, this issue has never before been raised at any stage of this

case. Not only was the issue not pleaded, briefed, or argued in the court below, but *it was not raised in Appellants Jurisdictional Statement.* This Court has not agreed to hear this issue, the issue has very little relevance to any constitutional analysis of this statute, and refusal by this Court to hear the issue would not prejudice Plaintiff's rights to assert such complaint in a separate lawsuit. Consequently, this Court should not permit Plaintiff to assert for the first time at this high appellate level a new and totally unrelated challenge to §2.02.

PRAYER

On the basis of the foregoing analysis, Appellee Texas Optometric Association, Inc. respectfully urges that this Honorable Court affirm the judgment of the lower court with respect to this appeal on the constitutionality of §2.02.

Respectfully submitted,
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By Larry Niemann
Larry Niemann
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Optometric Association, Inc.

Certificate of Service

I hereby certify that a true and correct copy of this brief has been deposited in the U.S. Mail, Certified Mail, Return Receipt Requested, addressed to Robert Q. Keith, attorney for Dr. N. Jay Rogers, 1400 San Jacinto Building, Beaumont, Texas 77701, Brian R. Davis, attorney and W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, 408 First Federal Plaza, 200 E. 10th Street, Austin, Texas 78701, John G. Tucker, attorney for Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, Dr. Sal Mora, individually, P. O. Box 1751, Beaumont, Texas 77704, Dorothy Prengler, Assistant Attorney General of Texas, attorney for Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, and Dr. Sal Mora, in their official capacity as members of the Texas Optometry Board, Supreme Court Building, P. O. Box 12548, Austin, Texas 78711, and Victor J. Rogers, II, 3434 One Allen Center, Houston, Texas 77002, on this 18th day of August, 1978.

Larry Niemann

Larry Niemann

APPENDIX

Summary of Past Litigation Involving Attacks On Validity Of Optometry Law

Broughton v. Pray, No. 99,567 In the 53rd District Court of Travis County, Texas (1954). Commercial optometrist (Texas Optical) sought to invalidate the first rules adopted by the Board prohibiting assumed name practice, advertising, window displays, etc. The district court held all of the rules valid.

Rogers v. Pray, No. D-67812 In the District Court of Jefferson County, Texas (1954). Commercial optometrist (TSO) sued the Board asking $250,000 damages and an injunction from enforcing the Optometry rules. The case was dismissed after three years for want of prosecution.

Carp v. Texas State Board of Examiners in Optometry, No. 95843-B In the 44th Judicial District Court of Dallas County, Texas (1954). Commercial optometrists (Lee Optical) sought to enjoin enforcement of all of the optometry rules and sought $2,250,000 in damages. Upon being put to trial, the commercial optometrists took a non-suit and the case was dismissed.

Shannon v. Baber, No. 11,325B In the 44th Judicial District of Dallas County, Texas and No. 104,397 In the 126th Judicial District Court of Travis County, Texas (1956). Commercial optometrists (Lee Optical) sued to enjoin enforcement of the basic competence rule, the Corporate Practice rule and the Bait Advertising rule and for $2,500,000 damages. After a venue trial in Dallas County, the case was transferred to Travis County where the commercial optometrists took a non-suit.

Kee v. Baber, 303 S.W.2d 376 Tex. Sup. Ct. (1957). Commercial optometrist (with Lee Optical) challenged validity of Basic Competence Rule, the Corporate Practice Rule, and the Bait Advertising Rule. The Supreme Court upheld the rules.

Carp v. Texas State Board of Examiners in Optometry, No. 108,976 In the 126th Judicial District of Travis County, Texas (1958). Commercial optometrist (Lee Optical) sued to enjoin enforcement of the corporate practice rule. The case was dismissed on motion of the Plaintiffs.

Texas State Board of Examiners in Optometry v. Carp, 343 S.W.2d 242 (Sup. Ct. Tex. 1961) The Board sued to enjoin a commercial optometrist from permitting his employees to practice optometry without a license. The commercial optometrist cross-claimed seeking to enjoin the Board from enforcing any optometry law against him, including those dealing with advertising and practicing in a non-partitioned office. The Supreme Court ruled for the optometry board and against the commercial optometrist.

Texas State Board of Examiners in Optometry v. Carp, 412 S.W.2d 307 (Tex. Sup. Ct. 1967). Commercial Optometrists (Lee Optical owner) sued to have the Professional Responsibility Rule declared invalid. After seven years in court and two trips to the Supreme Court of Texas, the Professional Responsibility Rule was upheld.

Rogers v. Burton, 496 S.W.2d 673 (Tex. Civ. App. 1973). Commercial optometrist sued to declare invalid the Board interpretation of the Optometry Act grandfather clause regarding an optometrist leasing from an optician . The trial court and appeals court held the interpretation valid.

Burton v. Rogers, 504 S.W.2d 404 (Tex. Sup. Ct. 1974). Commercial optometrists (Dr. Rogers, TSO) challenged validity of Board interpretation of §5.09(a) prohibiting optometrists from advertising "reference to price." The case went to the Texas Supreme Court on a venue question which the Commercial optometrists lost.

Texas Optometry Board v. Lee Vision Center, 515 S.W.2d 380 (Tex. Civ. App. 1974, Writ ref. n.r.e.). A commercial optometrist (Lee Optical) challenged validity of Board interpretation of §5.09(a), prohibiting optometrists from advertising "reference to price." The Court held Board interpretation of statute was valid and enforceable.

Rogers v. Friedman et al, No. B-75-277-CA in the U.S. District Court in Beaumont (1975). Commercial optometrist (TSO) seeks to declare unconstitutional AOA affiliation requirement, trade name prohibition, full disclosure in referrals by optometrists, and price advertising prohibition for optometrists. Case still pending.

Fried et al v. Sticksel et al, No. CA-76-0377-G in the U.S. District Court in Dallas (1976). Commercial optometrist (Lee Optical) and TAO (commercial optometry association) sought to declare the continuing education statute unconstitutional. Case dismissed by plaintiffs.

Shropshire v. Sticksel, No. CA3-76-1180-G in the U.S. District Court in Dallas (1976). Commercial optometrist (Lee Optical) seeks to declare invalid the Board's memorandum opinion prohibiting optician signs from overlapping an optometrist's office. Case still pending.

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STATE OF TEXAS

COUNTY OF TRAVIS

AFFIDAVIT

On July 25, 1976, the Board of Directors of the Texas Optometric Association, Inc., initiated action to change the membership requirements of TOA regarding advertising. Such action was culminated on May 5, 1978, when the TOA House of Delegates overwhelmingly voted to amend the TOA By-Laws to completely revise Article XIV, which outlines the TOA standards of professional conduct. A true and correct copy of Article XIV as revised is attached. The revised by-laws eliminate all restrictions on advertising that previously existed in the TOA By-Laws. Also attached is a true and correct copy of the TOA Code of Ethics which was reaffirmed in its entirety by the TOA House of Delegates on May 5, 1978.

As attorney for the Texas Optometric Association, Inc., I have personal knowledge that the above stated facts are true, and I do so affirm.

Larry Niemann

Larry Niemann

Sworn to and subscribed before me by Larry Niemann, Attorney for the Texas Optometric Association, Inc., on this 15th day of August 1978

(SEAL)

Fred Niemann Jr

Notary Public in and for
Travis County, Texas

BY-LAWS
OF THE
TEXAS OPTOMETRIC ASSOCIATION, INCORPORATED

Revised 5/78

Article XIV
Professional Conduct

Section 1. The Texas optometry laws, as amended from time to time, shall be complied with by members of this Association. Optometry laws shall include statutes and interpretations thereof by the courts and the Texas Optometry Board.

Section 2. The Code of Ethics of this Association, as amended from time to time, shall serve as a guide for the professional conduct of the members of this Association.

Section 3. The Standards of Conduct of the American Optometric Association, as amended from time to time, shall serve as a guide for the professional conduct of the members of this Association. In such Standards of Conduct, the terms "shall" and "should" are to be construed as setting forth "recommended" standards rather than "mandatory" standards of conduct except where state optometry laws require standards of conduct to be mandatory.

Section 4. If a member willfully violates any state optometry law and/or interpretations thereof, or if a member willfully violates the Code of Ethics, Constitution, or By-Laws of this Association, it shall be considered unprofessional conduct.

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CODE OF ETHICS

It shall be the Ideal, the Resolve, and the Duty of the members of the Texas Optometric Association, Inc.;

To keep the visual welfare of the patient uppermost at all times;

To promote in every possible way, in collaboration with this Association, better care of the visual needs of mankind;

To enhance continuously their education and technical proficiency to the end that their patients shall receive the benefits of all acknowledged improvements in visual care;

To see that no worthy person shall lack for visual care, regardless of his financial status;

To advise the patient whenever consultation with an optometric colleague or reference for other professional care seems advisable;

To hold in professional confidence all information concerning a patient and to use such data only for the benefit of the patient;

To conduct themselves as exemplary citizens;

To maintain their offices and their practices in keeping with professional standards;

To promote and maintain cordial and unselfish relationships with members of their own profession and of other professions for the exchange of information to the advantage of mankind.

(Adopted at 47th Annual Convention of TOA, April 20, 1947)

(Reaffirmed at 78th Annual Convention of TOA, May 5, 1978)

FTC REGULATIONS PROMULGATED MAY 24, 1978

Federal Register, Vol. 43, No. 107, p.23992 at 24006-24008, (June 2, 1978), Trade Regulation Rules — Advertising of Opthalmic Goods and Services.

§456.1 *Definitions*

(a) A *"buyer"* is any person who has had an eye examination.

(b) The *"dissemination of information"* is the use of newspapers, telephone directories, window displays, signs, television, radio, or any other medium to communicate to the public any information, including information concerning the cost and availability of a product or service.

(c) An *"eye examination"* is the process of determining the refractive condition of a person's eyes or the presence of any visual anomaly by the use of objective or subjective tests.

(d) *"Ophthalmic goods"* consist of eyeglasses, or any component of eyeglasses and contact lenses.

(e) *"Ophthalmic services"* are the measuring, fitting, and adjusting of ophthalmic goods to the face subsequent to an eye examination.

(f) A *"person"* means any party over which the Federal Trade Commission has jurisdiction. This includes individuals, partnerships, corporations, and professional associations.

(g) A *"prescription"* is the written specifications for ophthalmic lenses which are derived from an eye examination. The prescription shall contain all of the information necessary to permit the buyer to obtain the necessary ophthalmic goods from the seller of his choice. In the case of a prescription for

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contact lenses, the refractionist must include in the prescription only those measurements and directions which would be included in a prescription for spectacle lenses.

All prescriptions shall include all of the information specified by state law, if any.

(h) A *"refractionist"* is any Doctor of Medicine, Osteopathy or Optometry or any other person authorized by state law to perform eye examinations.

(i) A *"seller"* is any person, or his employee or agent, who sells or provides ophthalmic goods and services directly to the public.

§456.2 *Private Conduct*

(a) It is an unfair act or practice for sellers to fail to disseminate information concerning ophthalmic goods and services notwithstanding state or local law to the contrary. *PROVIDED:* Violation of this subpart by any seller acting alone shall not be deemed to be a violation of Section 5(a)(1) of the Federal Trade Commission Act.

To prevent this unfair act or practice, any seller may engage in the dissemination of information concerning opthalmic goods and services subject to the limitations expressed in Section 456.5 below.

(b) It is an unfair act or practice for refractionists to fail to disseminate information concerning eye examinations notwithstanding state or local law to the contrary. *PROVIDED:* Violation of this subpart by any refractionist acting alone shall not be deemed to be a violation of Section 5(a)(1) of the Federal Trade Commission Act.

To prevent this unfair act or practice, any refractionist may engage in the dissemination of information concerning eye

examinations. Nothing in this subpart shall excuse a refractionist from compliance with any state or local law which permits the dissemination of information concerning eye examinations, including information on the cost and availability of those examinations, but requires that specified affirmative disclosures also be included.

§456.3 *Public Restraints*

It is an unfair act or practice under Section 5 of the Federal Trade Commission Act for any state or local governmental entity or any subdivision thereof, state instrumentality, or state or local governmental official to enforce any:

(a) prohibition, limitation or burden on the dissemination of information concerning ophthalmic goods and services by any seller or group of sellers, or

(b) prohibition, limitation or burden on the dissemination of information concerning eye examinations by any refractionist. *PROVIDED:* Nothing in subpart (b) shall be construed to prohibit the enforcement of a state or local law which permits the dissemination of information concerning eye examinations, including information on the cost and availability of those examinations, but requires that specified affirmative disclosures also be included.

Violation of subparts (a) and (b) shall not be deemed for purposes of Section 5(m)(1)(A) or Section 19 of the Federal Trade Commission Act to be a violation of Section 5(a)(1) of the Act.

§456.4 *Conformance to State Law*

It is an unfair act or practice under Section 5 of the Federal Trade Commission Act:

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(a) for any seller to reduce, limit, or burden the dissemination of information concerning ophthalmic goods and services in order to comply with any law, rule, regulation or code of conduct of any nonfederal legislative, executive, regulatory or licensing entity or any other entity or person, which would have the effect of prohibiting, limiting, or burdening the dissemination of this information, or

(b) for any refractionist to reduce, limit, or burden the dissemination of information concerning eye examinations in order to comply with any law, rule, regulation or code of conduct of any nonfederal legislative, executive, regulatory or licensing entity or any other entity or person, which would have the effect of prohibiting, limiting, or burdening the dissemination of this information. *PROVIDED:* To the extent that a state or local law, rule, or regulation permits the dissemination of information concerning eye examinations, including information on the cost and availability of those examinations, compliance with that law or regulation shall not be construed to reduce, limit or burden the dissemination of information concerning eye examinations.

§456.5 *Permissible State Limitations*

(a) To the extent that a state or local law, rule, or regulation requires that any or all of the following items be included within any dissemination of information concerning ophthalmic goods and services, such a law, rule, or regulation shall not be considered to prohibit, limit, or burden the dissemination of information:

(1) whether an advertised price includes single vision and/or multifocal lenses;

(2) whether an advertised price for contact lenses refers to soft and/or hard contact lenses;

(3) whether an advertised price for ophthalmic goods includes an eye examination;

(4) whether an advertised price for ophthalmic goods includes all dispensing fees; and

(5) whether an advertised price for eyeglasses includes both frames and lenses.

(b) Where a state or local law, rule or regulation applies to all retail advertisements of consumer goods and services (including a law, rule, or regulation which requires the affirmative disclosure of information or imposes reasonable time, place and manner restrictions), such a law, rule, or regulation shall not be considered to prohibit, limit, or burden the dissemination of information.

(c) If, upon application of an appropriate state or local governmental agency, the Commission determines that any additional requirement of any such state or local governmental agency deemed by that agency to be necessary to prevent deception or unfairness is reasonable and does not unduly burden the dissemination of information, then that requirement shall be permitted to the extent specified by the Commission.

§456.6 *Private Restraints*

(a) It is an unfair act or practice for any person, other than a state or a political subdivision or agency thereof, to prohibit, limit or burden:

(1) the dissemination of information concerning ophthalmic goods and services by any seller;

(2) the dissemination of information concerning eye examinations by any refractionist. *PROVIDED:* Nothing in this subpart shall be construed to prohibit any person from impos-

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ing reasonable affirmative disclosure requirements on the dissemination of information concerning eye examinations.

(b) Any organization or association which is not composed primarily of sellers and/or refractionists, which adopts or enforces self-regulatory guidelines for the dissemination of information which apply to all retail advertisements of consumer goods and services, shall not be deemed to be in violation of this subpart.

(c) The conditioning of membership in a professional or trade association of sellers or refractionists on a requirement that members or prospective members of that association not engage in the dissemination of information concerning ophthalmic goods and services be advertised only in a prescribed manner shall be deemed to prohibit, limit or burden the dissemination of that information.

§456.7 *Separation of Examination and Dispensing*

In connection with the performance of eye examinations, it is an unfair act or practice for a refractionist to:

(a) fail to give to the buyer a copy of the buyer's prescription immediately after the eye examination is completed. *PROVIDED:* A refractionist may refuse to give the buyer a copy of the buyer's prescription until the buyer has paid for the eye examination but only if that refractionist would have required immediate payment from that buyer had the examination revealed that no ophthalmic goods were required;

(b) condition the availability of an eye examination to any person on a requirement that that person agree to purchase any ophthalmic goods from the refractionist;

(c) charge the buyer any fee in addition to the refractionist's examination fee as a condition to releasing the prescription to

the buyer. *PROVIDED:* A refractionist may charge an additional fee for verifying ophthalmic goods dispensed by another seller when the additional fee is imposed at the time the verification is performed; or

(d) place on the prescription, or require the buyer to sign, or deliver to the buyer a form or notice waiving or disclaiming the liability or responsibility of the refractionist for the accuracy of the eye examination or the accuracy of the ophthalmic goods or services dispensed by another seller.

§456.8 *Federal or State Employees*

Nothing in this part shall be construed to prohibit any federal, state or local government entity from adopting and enforcing standards or requirements concerning the dissemination of information and release of prescriptions by sellers or refractionists employed by those governmental entities.

§456.9 *Declaration of Commission Intent*

(a) It is the purpose of this part to allow retail sellers of opthalmic goods and services to disseminate information concerning those goods and services in a fair and nondeceptive manner to prospective purchasers. This part is intended to eliminate certain restraints, burdens, and controls imposed by state and local governmental action as well as by private action on the dissemination of information, including advertising, concerning ophthalmic goods and services.

It is the intent of the Commission that this part shall preempt all state and local laws, rules, or regulations that are repugnant to this part, and that would in any way prevent or burden the dissemination of information by retail sellers of ophthalmic goods and services to prospective purchasers, except to the extent specifically permitted by this part. All

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state or local laws, rules, or regulations which burden the dissemination of information by requiring affirmative disclosures specifically addressed to ophthalmic goods and services are preempted, except for those specifically permitted by this part. State and local laws, rules, or regulations which apply to advertising of all consumer goods and services, including those that require affirmative disclosure of information, are not preempted.

(b) It is the Commission's intent that state laws which do not permit refractionists to disseminate information concerning eye examinations, including information concerning the cost and availability of those examinations, be preempted. State and local laws, rules or regulations which require affirmative disclosure of information in all disseminations of information concerning eye examinations are not preempted.

(c) The Commission intends this part to be as self-enforcing as possible. To that end, it is the commission's intent that this part may be used, among other ways, as a defense to any proceeding of any kind which may be brought against any retail seller of ophthalmic goods and services or refractionist who advertises in a nondeceptive and fair manner.

(d) It is not the Commission's intent to compel any seller or refractionist to disseminate information by virtue of this part. On the contrary, the provisions of this part are intended solely for the protection of those sellers and refractionists who want to disseminate information but have been restrained or prevented from advertising due to the prohibitions and restrictions of state and local laws and regulations, or by private action.

(e) In prohibiting the use of waivers and disclaimers of liability in Section 456.4(d), it is not the Commission's intent to impose liability on a refractionist for the ophthalmic goods

and services dispensed by another seller pursuant to that refractionist's prescription.

(f) In this part, the Rule, each subpart, and the Declaration of Commission Intent and their application are separate and severable.

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